RS Krishnan a/l RS Naidu v Eric Soon Boo Teck (Rawang Hills Resort Sdn Bhd, third party)

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO MT1–22–101 OF 1997
MOHD HISHAMUDIN J
29 JULY 2003

Civil Procedure — Striking out — Statement of claim — Affidavits in support of application — Whether affidavits in support consistent with grounds set out in summons in chambers — Rules of the High Court 1980 O 18 r 19(1)(a), (b), (c), (d)

The plaintiff had filed a suit against the defendant for defamation. The plaintiff claimed that the defendant falsely and maliciously wrote and published or cause to be written and published words contained in a type written undated draft statutory declaration drafted by the defendant. Subsequently, the defendant applied to strike out the plaintiff's statement of claim pursuant to O 18 r 19(1)(b), (c) and (d) of the Rules of the High Court 1980 ('the RHC'). The learned senior assistant registrar dismissed the defendant's application. The defendant appealed.

Held, dismissing the appeal:

(1) The defendant relied on O 18 r 19(1)(b), (c) and (d) of the RHC to strike out the plaintiff's statement of claim. Therefore, the legal burden was on the defendant to show that the statement of claim was scandalous, frivolous or vexatious; or may prejudice, embarrass or delay the fair trial of the action; or was an abuse of the process of the court. This burden should be discharged by affidavit evidence (see para 5).

(2) Upon examining the defendant's two affidavits ie, encls 13 and 16 it was held that the defendant had failed to show that the statement of claim was within the three limbs relied on by him, ie O 18 r 19(1)(b), (c) and (d) (see para 6).

(3) It appeared that the only ground given by the defendant in his affidavit was that the statement of claim did not disclose any reasonable cause of action. As a matter of law, the defendant could not rely on this ground which is the first limb, ie O 18 r 19(1)(a) of the RHC since the defendant had stated in his summons in chambers that he was merely relying on limbs (b), (c) and (d) (see para 8).

(4) The affidavits in support should not contradict or be inconsistent with the grounds set out in the summons in chambers. Therefore, there was no merit in the defendant's application (see paras 8–9).

[Bahasa Malaysia summary

Plaintif telah memfailkan satu guaman terhadap defendan kerana fitnah. Plaintif telah mendakwa yang defendan telah secara palsu dan dengan niat jahat menulis dan menerbitkan atau menyebabkan ditulis dan diterbitkan perkataan-perkataan yang terkandung dalam sejenis draf deklarasi statutori bertulis yang tidak bertarikh oleh defendan. Berikutan itu, defendan telah

A memohon untuk membatalkan pernyataan tuntutan plaintif menurut A 18 k 19(1)(b), (c) dan (d) Kedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Penolong kanan pendaftar telah menolak permohonan defendan. Defendan telah merayu.

B **Diputuskan**, menolak rayuan tersebut:

(1) Defendan telah bergantung kepada A 18 k 19 (1)(b), (c) dan (d) KMT untuk membatalkan pernyataan tuntutan plaintif. Oleh itu, beban perundangan terletak atas defendan untuk membuktikan bahawa pernyataan tuntutan tersebut adalah berniat jahat, remeh atau menyusahkan; atau mungkin memprejudiskan, memalukan atau
C melambatkan perbicaraan adil tindakan tersebut; atau adalah satu penyalahgunaan proses mahkamah. Beban ini hendaklah dilepaskan dengan satu keterangan afidavit (lihat perenggan 5).

(2) Setelah memeriksa dua afidavit defendan, iaitu lampiran-lampiran 13 dan 16, ia telah memutuskan bahawa defendan telah gagal untuk menunjukkan bahawa pernyataan tuntutan adalah dalam ruang
D lingkup tiga cabang yang beliau bergantuing kepada, iaitu A 18 k 19(1)(b), (c) dan (d) (lihat perenggan 6).

(3) Ia kelihatan yang satu-satunya alasan diberikan oleh defendan dalam afidavit beliau adalah bahawa pernyataan tuntutan tersebut tidak menunjukkan apa-apa kausa tindakan yang munasabah. Mengikut
E undang-undang, defendan tidak boleh bergantung kepada alasan ini iaitu cabang pertama, iaitu A 18 k 19(1)(a) KMT memandangkan defendan telah menyatakan dalam saman dalam kamar bahawa beliau hanya bergantung kepada cabang-cabang (b), (c) dan (d) (lihat perenggan 8).

F (4) Afidavit-afidavit sokongan tidak sepatutnya bercanggah atau tidak konsisten dengan alasan-alasan yang dinyatakan dalam saman dalam kamar. Oleh itu, tiada merit dalam permohonan defendan (lihat perenggan-perenggan 8–9).]

G **Notes**

For cases on striking out of statement of claim, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5631–5641.

Legislation referred to

H Rules of the High Court 1980 O 18 r 19(1)(a), (b), (c), (d)

Datuk N Chandran (Ranjan Chandran with him) (Ranjan Chitravathy & Co) for the plaintiff.

DP Naban (SC Cheah with him) (Lee Hishammuddin) for the defendant.

I **Mohd Hishamudin J**:

[1] This is an appeal by the defendant against the decision of the learned Senior Assistant Registrar, High Court, Shah Alam, given on 23 June 1998

dismissing the defendant's application to strike out the plaintiff's statement of claim pursuant to O 18 r 19(1)(b), (c) and (d) of the Rules of the High Court 1980.

[2] In March 1997, the plaintiff filed a suit against the defendant for defamation. Paragraphs 3 to 9 of the statement of claim states:

3 On or about 24 September 1996, the defendant falsely and maliciously wrote and published or cause to be written and published words contained in a type written undated draft statutory declaration drafted by the defendant which is defamatory of the plaintiff.

'Paragraph 4 — After the judgment, I, together with Hamzah bin Salas and another ('the parties') then negotiated with M/s SB Cheah & Associates to act for Taipan Pacific Capital Sdn Bhd ('Taipan') to facilitate our negotiations with certain parties to sell the land.

Paragraph 5 — On 20 November 1995, Taipan lodged a private caveat vide Presentation No 39498 Jilid 80 Folio 120 ('the caveat') to disrupt the transfer of the land to Rawang Hills Resort Sdn Bhd ('RHR').

Paragraph 6 — An application for stay of execution of the judgment was subsequently filed. The application for stay was dismissed on 16 December 1995 and it was agreed by the parties that Taipan would maintain the caveat over the land and only withdraw the Caveat if the sum of RM1.2m is paid by RHR to Taipan.

Paragraph 7 — On 9 January 1996, RHR filed an application to remove the Caveat. The sum of RM1.5m was subsequently paid by RHR to Taipan through M/s SD Cheah & Associates to facilitate the removal of the caveat. The application to remove the caveat was then withdrawn.

Paragraph 8 — M/s SB Cheah & Associates knowingly agreed to act for Taipan to execute the above plan for a fee of RM400,000 which was paid out of the RM1.5m.'

4 The said draft statutory declaration was annexed to a covering letter which was signed by the defendant. The said draft statutory declaration was dictated by the defendant to a typist or for transcription by a typist in the employment of M/s PM Tan, Chan & Partners, who the plaintiff cannot at present identify. The word 'I' appearing in the draft statutory declaration referred to the plaintiff.

5 The said draft statutory declaration together with the covering letter annexed thereto was served by fax at 4.07pm on 24 September 1996 and also posted by ordinary mail to M/s R Kengadharan & Co's (Advocates & Solicitors) office in Petaling Jaya.

6 The said advocates and solicitors were then the solicitors representing the plaintiff in the originating summons No 24–509–96 at Shah Alam High Court.

7 At all material times, the defendant knew that the draft statutory declaration was meant to be received by and read by the employees of the firm of the said advocates and solicitors as well as the solicitor himself in the ordinary course of business. It was in fact read by the clerk and the staff of the firm of the said advocates and solicitors.

8 In their natural and ordinary meaning the said words referred to in paragraph 3 above meant and were understood to mean that —

a) The plaintiff had masterminded a criminal conspiracy to extort money from the company called Rawang Hills Resort Sdn Bhd.

b) The plaintiff had conspired with one Hamzah Salas, another unidentified person, a firm of solicitors known as M/s SB Cheah & Associates and a corporation called Taipan Pacific Capital Sdn Bhd (named parties) to lodge a private caveat on the land ordered to be transferred to Rawang Hills Resort Sdn Bhd to disrupt the pending transfer.

c) The plaintiff had conspired with the named parties to maintain the caveat and withdraw it upon payment of RM1.2m by Rawang Hills Resort Sdn Bhd.

d) The Plaintiff had played a part in the procurement RM1.5m paid through M/s SB Cheah & Associates in order to facilitate the removal of the caveat.

9 The said words were calculated to disparage the plaintiff and his reputation has been seriously damaged. The plaintiff has also suffered considerable distress and embarrassment and general loss of business opportunities.

[3] On 12 February 1998, by summons in chambers (encl 14) the defendant made an application to strike out the statement of claim pursuant to O 18 r 19(1)(b), (c) and (d) of the Rules of the High Court 1980 ('the RHC'). The grounds given for the application are as follows:

a) ia mengaibkan, remeh atau menyusahkan; atau

b) ia boleh menjejaskan, menghalang atau melengahkan perbicaraan tindakan itu dengan adil; atau

c) ia adalah suatu penyalahgunaan proses Mahkamah ini.

[4] First, it is my observation that the defendant is not relying on limb (a) of para (1) of r 19 of O 18. In other words, the defendant is not claiming that the plaintiff in his statement of claim has not disclosed a reasonable cause of action. Thus, as far as the present application is concerned, whether or not the statement of claim discloses a reasonable cause of action is a non-issue. To repeat what has been said earlier, the defendant is merely relying on limbs (b), (c) and (d).

[5] In this application, as the applicant/defendant is relying on limbs (b), (c) and (d), the legal burden is on the applicant/defendant to show that the statement of claim is scandalous, frivolous or vexatious; or may prejudice, embarrass or delay the fair trial of the action; or is an abuse of the process of the court. He must discharge this burden by affidavit evidence.

[6] However, upon examining the defendant's two affidavits (ie encl 13 and 16), I am of the view that the defendant has failed to show that the statement of claim is scandalous, frivolous or vexatious; or may prejudice, embarrass or delay the fair trial of the action; or is an abuse of the process of court.

[7] At the last paragraph of the defendant's affidavit at encl 13, ie paragraph 13 the defendant merely states:

> 13 Di dalam premis ini, saya dinasihatkan oleh peguamcara saya dan sesungguhnya percaya bahawa plaintiff tidak mempunyai kausa tindakan yang munasabah terhadap diri saya dan tindakan yang difailkan di sini adalah satu penyalahgunaan proses mahkamah.

[8] It appears that the only ground given by the defendant in his affidavit is that the statement of claim does not disclose any reasonable cause of action (and it is my understanding that the averment *dan tindakan yang difailkan di sini adalah satu penyalahgunaan proses Mahkamah* is meant by the defendant to be consequential to there being no reasonable cause of action). However, as a matter of law, the defendant cannot rely on this ground in his affidavit. For this is a 'limb (a)' ground, whereas defendant had stated in his summons in chambers that he is merely relying on limb (b), (c) and (d). The affidavits, therefore, must only contain averments justifying the defendant's reliance on limbs (b), (c) and (d). But such averments are not found in the affidavits. The affidavits in support cannot contradict or be inconsistent with the grounds set out in the summons in chambers.

[9] I conclude by saying that there is no merit in the defendant's application. The defendant's appeal was accordingly dismissed with costs.

Appeal dismissed.

Reported by Annette John